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No. 50

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER

v.

THE HOWARD P. FOLEY COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 16–20) is reported in 63 F. Supp. 209.

JURISDICTION

The judgment of the Court of Claims was entered on December 3, 1945 (R. 20). The petition for a writ of certiorari was filed on March 1, 1946, and was granted on April 22, 1946 (R. 22). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether, under the standard form of Government construction contract, the Government is liable in damages to the contractor when the contractor is unable to complete performance within the time specified in the contract due to the Government's inability, despite its skill and diligence, to have the site completely ready for the contractor within that time, and when the delay was due to unforeseeable causes.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and specifications involved are set out in the Appendix, *infra*, pp. 28–32.

STATEMENT

This is a suit to recover from the United States damages claimed to be due to delays in the performance of a Government contract (R. 1–2). The facts, as found by the Court of Claims (R. 9–16), are as follows:

On June 27, 1940, respondent, an electrical contractor, engaged in business in Washington, D. C. (Fdg. 1; R. 9), entered into a contract with the United States, on standard form Government contract No. 23, to furnish the materials and to construct a field lighting system for the Washington National Airport, Gravelly Point, Virginia, at the contract price of $187,000 (Fdg. 2; R. 9, 1, 3).

The work was to be "commenced as soon as practicable" and "completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed" (Fdg. 2; R. 9, 3; *infra*, p. 28). Notice to proceed was received by respondent on July 15, 1940 (Fdg. 2; R. 9) but performance was not completed until April 18, 1941 (Fdgs. 3, 4; R. 10, 12).

The site of the Airport was "created" by hydraulic dredging and the Government sought to achieve, in less than one year, a degree of site stabilization which would ordinarily require four or five years (Fdg. 5; R. 14). "Pockets of unsatisfactory material were found" in the materials deposited on the runway sites by the dredges and these "had to be replaced with satisfactory material" (Fdg. 5; R. 15). Other substitutions of materials also had to be made "in order to achieve the necessary compaction" (Fdg. 5; R. 15). Respondent's work could not be done before the runways were paved. "When an area had been properly filled, graded and surfaced, it was released" to respondent for the "work pertaining to its contract in that area" (Fdg. 5; R. 15). Because of "a lack of uniformity in the material deposited" by the dredges, "the areas were not * * * ready for delivery to [respondent] except in detachments" and "there was a marked lack of continuity in [respondent's] work due to the scattered deliveries thus made" (Fdg.

5; R. 15). "The length of time taken to make the fill, stabilize the material, do the grading and paving, was not anticipated by the [Government's] engineers. They were skillful and diligent in their work, and released areas to the [respondent] as fast as they were able to do so" (Fdg. 5; R. 15, 17).

Respondent complained to the Government's resident engineer regarding the delays thus encountered, and, on September 3, 1940, asked the contracting officer for an extension of time of performance "and adjustment for additional overhead and expense" (Fdg. 4; R. 10, 12). On September 23, 1940, the contracting officer replied, instructing respondent to keep him and the resident engineer "currently informed as to all matters of delay, and stating that upon completion of the work, consideration would be given to an appropriate extension of time" (Fdg. 4; R. 10). On December 20, 1940, the contracting officer made, *inter alia*, the following findings of fact (Fdg. 4; R. 10–12):

> Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your

> work in an expeditious manner. It appears that your forces of W. P. A. laborers were reduced materially for protracted periods due to such unforeseeable causes of delay. The Administration's representative reports that the record is free from any act on your part which caused delay; that your work was prosecuted diligently insofar as it was possible for you to do so; that at no time have you been entirely stopped from your work and that such work as you were not able to do could have been done if the progress on the runways had been all that had been expected. * * *

The contracting officer accordingly found that respondent was entitled to "an extension of contract time" and extended its time 79 days (Fdg. 4; R. 11–12). On May 17, 1941, after respondent's work was completed (Fdg. 3; R. 10), and pursuant to respondent's request for a further extension of time for performance (Fdg. 4; R. 12), the contracting officer made similar findings of fact and granted respondent an additional 78-day extension of time (Fdg. 4; R. 12–14). The extensions thus granted extended the time for respondent's performance to the date on which respondent completed performance (Fdgs. 3, 4; R. 10, 12–14).

Respondent was paid the contract price as adjusted by change orders (Fdg. 3; R. 10) and no

liquidated damages for delay were charged against or collected from it (Fdg. 4; R. 14).

In August 1941, respondent "filed a claim with the Civil Aeronautics Administration of the Department of Commerce for damages due to unforeseeable delays", which claim was denied "for lack of jurisdiction" (Fdg. 7; R. 16).

On August 19, 1942, respondent brought this suit in the Court of Claims (R. 1–3), alleging that it had incurred increased costs[1] due to the 157-day period beyond the original contract time over which its performance was extended (R. 2). The Court of Claims held that the 120-day limitation was "an obligation of the Government * * * to make performance within 120 days possible. * * * The Government failed in such performance and must respond in damages for the breach" (R. 19). The court entered judgment for the respondent in the amount of $6,393.69 (R. 16, 20).[2]

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[1] "Additional overhead by way of maintaining superintendent and administrative forces, together with equipment and operators therefor, upon the site of the work for 157 days longer than would have been necessary had the work proceeded without such delay, and * * * additional Social Security and unemployment taxes and workmen's compensation insurance upon the superintendent, administrative and other forces * * * together with an additional general overhead * * *" (R. 2).

[2] Damages allowed comprised the "pay roll of supervisory employees for the extent of delay" and compensation and liability insurance and taxes on such payroll (Fdg. 6; R. 15). Other damages claimed by respondent were disallowed as not sufficiently proved (Fdg. 6; R. 15–16, 20).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Government, by specifying that the work under the contract was to be completed within 120 days, assumed the obligation of making performance within 120 days possible.

2. In holding the Government liable in damages to the contractor for delays in the ultimate completion of the job.

3. In holding that the contractor could recover damages for delays in the ultimate completion of the job, in addition to e nsions of time granted the contractor by the contracting officer pursuant to Article 9 of the standard form of Government construction contract (*infra*, pp. 29–31).

4. In failing to follow the decisions of this Court in *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61, with respect to liability for such delays.

5. In holding the Government responsible for delays even though "the Government's representatives and operating force acted with great, if not unusual, diligence. They availed themselves of novel methods to assure expedition. No fault is or can be attributed to them" (Fdg. 5; R. 17, 15).

6. In holding that the delays were not due to unforeseeable causes, within the meaning of Article 9 of the standard form of Government construction contract (*infra*, pp. 29–31).

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7. In failing to accord finality to the findings of fact of the contracting officer (Fdg. 4; R. 10–14) that the delays were due to unforeseeable causes.

8. In entering judgment for respondent.

SUMMARY OF ARGUMENT

Because the contract here, like the contracts in *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61, neither expressly nor impliedly imposed upon the Government an obligation to make timely performance possible, the contractor is not entitled to damages attendant upon the delay. When the contractor received its extensions of time, provision for which is made by Article 9 of the contract when there is a delay due to "unforeseeable causes," and was thereby relieved of the liquidated damages which could otherwise have been imposed, it received all the relief to which it was entitled. What the court below did was to convert the respondent's duty to perform within 120 days into a Government warranty that it would be possible to do so.

The *Crook Co.* and *Rice* cases cannot be successfully distinguished from the case at bar. Whether the delay results from a failure of a prime contractor to prepare the site or from the inability of the Government to do so is immaterial, when the Government acts, as it did here, with "great, if not unusual diligence." The de-

lay here, like that in the *Rice* case, resulted from unexpected soil conditions, and gave rise to no right in the contractor to recover damages.

In holding that the conditions that caused the delay were "unforeseen" but not "unforeseeable" within the meaning of Article 9 of the contract, and that that Article, therefore, had no application to this case, the court below plainly misread the contracting officer's findings. The respondent itself acquiesced in the findings that the conditions were unforeseeable and was excused from the payment of liquidated damages as a result of those findings. They were binding on the parties and on the court.

Even if the conditions causing the delay were foreseeable, and could, despite the unappealed contrary findings of the contracting officer, be so treated by the court below, the judgment below was erroneous because the specifications in the contract required the contractor to satisfy itself in advance as to all matters which could affect the work under the contract. If there was a negligent failure to foresee the soil difficulties, the contractor assumed the responsibility for such failure. Moreover, the judgment below cannot be rested on the theory that the Government's notice to proceed was premature. The court below did not so find and, even if it was premature, the burden was on the contractor, under the specifications, to call that fact to the attention of the

Government. Having failed to do so, it must be deemed to have acquiesced.

ARGUMENT

THE GOVERNMENT WAS NOT OBLIGATED, UNDER ITS CONTRACT, TO MAKE PERFORMANCE BY RESPONDENT POSSIBLE WITHIN THE TIME PROVIDED BY THE CONTRACT FOR SUCH PERFORMANCE, AND WAS NOT LIABLE IN DAMAGES FOR ITS FAILURE TO DO SO

Respondent was required by its contract to complete performance within 120 days after notice to proceed (Fdg. 2; R. 9, 3; *infra*, p. 28). Completion within that time was rendered impossible by delays which occurred in constructing the Airport site (Fdgs. 4, 5; R. 11–15). As the court below found, these delays were unavoidable both by respondent and by the Government (Fdgs. 4, 5; R. 11, 13–15, 17). Respondent requested (Fdg. 4; R. 10, 12) and, the delays having been found by the contracting officer to be "due to unforeseeable causes" (Fdg. 4; R. 11–14), was granted adequate extensions of time as provided in Article 9 of its contract (Fdg. 4; R. 11–14, 5–6; *infra*, pp. 29–31). The court below held that the Government became obligated to make performance by respondent possible within the 120-day period provided by the contract for such performance; that its failure to make performance possible within that time was a breach of contract;[3] and that the Government "must respond

[3] The respondent is indulging in pure verbalism when it charges (Br. in Opp. 3) that the Government has misread the opinion of the court below. It states that the court did

in damages for the breach" (R. 19). In so holding, we submit that the court below erred.

A. *The Government assumed no obligation to make performance within 120 days possible.*—The two provisions of the contract principally involved are Article 1, which provided that respondent's work was to "be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed" (Fdg. 2; R. 9, 3; *infra*, p. 28), and Article 9 (R. 5–6; *infra*, pp. 29–31), which provided that if respondent failed to complete the work within the time set by Article 1, the Government could terminate the contract or require the payment of liquidated damages (R. 5; *infra*, pp. 29–30). Article 9 provided further (R. 5–6; *infra*, pp. 30–31):

> That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not re-

not hold that the Government was obliged to make performance within 120 days possible but rather that the Government "had the obligation of not making it *impossible* for the contractor to complete its work in the contract time by failing to carry out those parts of its obligation which were both necessary and preliminary to the contractor's work." But this is to say, in effect, only that the Government is liable for failing not to make timely performance impossible—a somewhat cruder manner of saying that the Government is liable for failing to make timely performance possible.

> stricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, * * * if the contractor shall * * * notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Such provisions are not novel to this Court. *Crook Co.* v. *United States,* 270 U. S. 4; *United States* v. *Rice,* 317 U. S. 61; *United States* v. *Blair,* 321 U. S. 730. And the decisions of this Court in the first two cited cases patently bar the respondent's claim here.

In the first case, the Crook Company contracted with the Government to install heating systems in two buildings under construction. Completion by the Crook Company of its work within the period specified in its contract was rendered impossible by delays on the part of the general contractors engaged in the construction of the buildings. This

Court held that the delays were unavoidable so far as both the Company and the Government were concerned, and that the Crook Company had no additional remedy by way of damages when it had been granted an extension of time on account of such delays. Thereafter, this Court, on the petition of the Government, granted certiorari in the *Rice* case, 316 U. S. 653, "to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract" in the *Crook Co.* case. *United States* v. *Rice*, 317 U. S. 61, 62. In that case, this Court held the Government not liable to the respondent engineering company for damages resulting from the delay caused by the Government's changes in the plans of the general contractor—changes resulting from unexpected soil conditions; the court there repeated the principle of the *Crook Co.* case that "it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *United States* v. *Rice*, 317 U. S. 61, 65; *Crook Co.* v. *United States*, 270 U. S. 4, 6.

Article 1 of the contract here involved (R. 3; *infra*, p. 28) fixed the time "very strictly" for

performance by respondent. Cf. *Crook Co.* v. *United States*, 270 U. S. 4, 6. Article 9 (R. 5–6; *infra*, pp. 29–31) provided that if respondent failed to complete the work within the time thus set, the Government was entitled to terminate the contract or to require the payment of liquidated damages. Neither in Article 1 nor in Article 9 is there to be found any express promise or any basis for implying a warranty by the Government as to the time within which performance could be completed; this would be the only ground on which the decision below could be supported. On the contrary, Article 9 expressly provides merely that the contractor shall not be liable for liquidated damages because of "acts of the Government," a provision which strongly suggests that the Government's liability is to be limited accordingly. Indeed, it is well settled that, in the absence of an express agreement to the contrary, a contractor is liable for breach of contract as a result of delay caused by even unanticipated difficulties. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; *Restatement of Contracts*, sec. 467; 6 Williston, *Contracts* (rev. ed., 1938), sec. 1964. Obviously, if the contractor is liable to the owner for such delays, the owner is not liable to the contractor and cannot be regarded as having warranted to the contractor that such delays will not ensue. Cf. *Day* v. *United States*, 245 U. S. 159. The decision below, however, attempts precisely this—

to turn respondent's duty to perform within 120 days into the Government's warranty that it would be possible to do so. Respondent, having had its time extended under Article 9 (Fdg. 4; R. 11–14) and having been paid the full contract price (Fdg. 3; R. 10), "is entitled to nothing more." *Crook Co.* v. *United States*, 270 U. S. 4, 7; *United States* v. *Rice*, 317 U. S. 61, 69.

B. *The distinction drawn by the court below between the* Crook Co. *and* Rice *cases and this case are insubstantial.*—Contrary to the decisions of this Court, the court below read into the instant contract an undertaking on the part of the Government which is neither expressed in the contract nor present by implication. It sought to distinguish this case from the *Crook Co.* and *Rice* cases on the grounds that the delays in those cases resulted from changes, required by the Government, which were specifically provided for in the contracts (R. 18–20);[4] that in those cases, "the basic work of construction was being done by another contractor [which] brought the provision for changes into play" (R. 18); that in the instant case, grading of the Airport site was done by the Government's own employees on "force account" and not through a contractor; and that "the Government does not order itself to make changes"

[4] That the delay in the *Crook* case was due to "changes," as the court below appears to have assumed, is open to question. See 59 C. Cls 593.

(R. 18). These attempted distinctions are baseless. That the delays in the *Crook Co.* and *Rice* cases may have been due to changes would not affect the principle of the *Crook Co.* case, stated by this Court to be that (270 U. S. at 6):

> The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do.

Nor would it affect the principle of the *Rice* case that "contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time." 317 U. S. at 65. See also *Chouteau* v. *United States*, 95 U. S. 61.

Indeed, this Court referred, in both the *Crook Co.* and *Rice* cases, to the "change order" provisions in the contracts only as indications that, so far as the Government was concerned, the completion time specified in the contract was "pro-

visional". 270 U. S. at 6; 317 U. S. at 65. It was not the fact that changes were made, but the reservation of the power to make changes which the Court thought significant.[a] Since the contract here involved also contains a reservation of authority to "make changes in the drawings and/or specifications of this contract and within the general scope thereof" (Article 3 of the contract, R. 4, *infra*, pp. 28–29) and to make changes in the contract upon discovery of "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications" (Article 4 of the contract, R. 4–5, *infra*, p. 29; cf. 317 U. S. at 65–66), one reason supporting the judgment of the court below disappears.

It would appear to be immaterial, moreover, whether the contractor was delayed by the work of another contractor or by the work of the Government done on force account (Fdg. 4; R. 11–13). This is particularly so where, as here, the Government's delay resulted from unforeseen soil conditions, also the operative cause of the delay in the *Rice* case. It would appear to be immaterial also whether the delay is caused by the Government as an incident to its contractual authority to make changes in the prime construction contract, as in the *Rice* case, or as an incident to its own performance of the basic construction work. Delays are as likely to occur and to be within the contemplation of the parties in the one case as in

the other. Indeed, the principles of the *Rice* and *Crook* cases are particularly applicable where, as here, "the Government's representatives and operating force acted with great, if not unusual, diligence" (Fdg. 5; R. 17, 15). Just as the respondent in the *Rice* case "was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work" (317 U. S. at 65), so the respondent in the instant case was required to adjust its work to "the paving of the runways and taxiways * * * the rough grading of the shoulders * * * by the Government" and knew that until that work was completed the site would not "be released to this Contractor for work under this contract." Section 5–2 of the specifications; Fdg. 2; R. 9–10; *infra*, p. 32. Cf. Section 3–25 of the specifications; Fdg. 2; R. 9, *infra*, pp. 31–32.

The instant contract imposed liability upon the Government for the delays suffered by respondent only to the extent of requiring the Government to excuse respondent from performance within the original contract time. This Court so held in the *Rice* case, when it said (317 U. S. at 69), with respect to the delay, that "the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. *Under the terms of the contract, it is entitled to no more.*" [Italics supplied.] But the

court below appears to have proceeded upon the theory that if the Government was not required by the contract to make possible respondent's performance within the 120 days, the Government would have had "an unlimited time for performance" (R. 18). This case, however, presents no question of "unlimited time for performance" or the equitable adjustments that might be required had the Government acted wilfully or maliciously. As found by the court below, the Government's representatives "were skillful and diligent in their work, and released areas to [respondent] as fast as they were able to do so" (Fdg. 5; R. 15). To the extent that the Government and, therefore, the respondent were delayed, the Government granted extensions of time to the respondent in which to complete performance, thereby excusing it from payment of liquidated damages under Article 9 of the contract.

C. *The conditions causing the delay were unforeseeable within the meaning of Article 9.*— Article 9 deals with delays due to "unforeseeable" conditions, and the court below held that since the contracting officer had, in his findings of fact, ascribed the delay to "unforeseen" soil conditions, Article 9 was inapplicable (R. 17). We think it plain, however, that this constituted a misconstruction of the contracting officer's findings.

The contracting officer, in making his findings of fact with respect to the extensions of time

granted respondent, did use the term "unforeseen" to describe the soil conditions which delayed the Government (Fdg. 4; R. 11, 13). But it is clear from his findings as a whole that he used it in the sense of "unforeseeable" as that term is used in Article 9 of the contract. In his findings of December 20, 1940 (Fdg. 4; R. 10–12), the contracting officer recited the provision of Article 9 that liquidated damages were not to be charged against the contractor because of delays "due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including but not restricted to acts of the Government" (Fdg. 4; R. 11). He then referred to the "unforeseen soil conditions" and to "such unforeseeable causes of delay", and found that respondent was "entitled to an extension of contract time commensurate with the actual delay caused you by such conditions" (Fdg. 4; R. 11). In his findings of May 17, 1941 (Fdg. 4; R. 12–14), the contracting officer referred to the extension of December 20, 1940, as one which "represented delays due to unforeseeable causes" (Fdg. 4; R. 12). He again recited the provision of Article 9 with reference to delays "due to unforeseeable causes" (Fdg. 4; R. 12), again referred to the "unforeseen soil conditions" which had delayed the Government (Fdg. 4; R. 13) and to "such unforeseeable causes of delay" (Fdg. 4; R. 13), and again found that respond-

ent was "entitled to an extension of contract time" (Fdg. 4; R. 13). In addition, in his findings of May 17, 1941, the contracting officer found that respondent had been delayed "due to excusable causes as contemplated by the contract provisions" (Fdg. 4; R. 13) and referred to the extension of time granted on that date as "due to unforeseeable causes of delay beyond your control and without your fault or negligence" (Fdg. 4; R. 14).

The only provision in the contract which authorized the contracting officer to grant extensions of time was to be found in Article 9. If the delays in completion of performance were not within the purview of the proviso to that Article, there was not only no authority in the contracting officer to grant the extensions but, on the contrary, respondent would have been liable to the Government for liquidated damages in the amount of $15,700 (Fdgs. 3, 4; R. 10–12). *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; Restatement of Contracts, Sec. 467; 6 Williston, *Contracts* (rev. ed., 1938), Sec. 1964. It is clear beyond dispute that the contracting officer, in granting the extensions, acted within the purview of Article 9 and, that by such action as well as by the very words he used and references he made to the provisions of Article 9, found that the delays were due to "unforeseeable" causes as that term is used in that Article.

The court below found that "No evidence has been proffered that the facts were contrary to those found by the contracting officer" (Fdg. 4; R. 14). Aside from the question of whether such evidence was proffered, however, the contracting officer's findings that the delays were due to unforeseeable causes were conclusive upon the parties and the courts in view of the provision to that effect in Article 9 (*Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185; *Ripley* v. *United States*, 223 U. S. 695, 704; *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed on rehearing, 261 U. S. 610; *United States* v. *McShain*, 308 U. S. 512, 520–521) and in view of respondent's failure to appeal from such findings (R. 6, 2). *United States* v. *Joseph A. Holpuch Co.*, Nos. 696 and 697, October Term, 1945, decided May 20, 1946; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Callahan Walker Co.*, 317 U. S. 56. The court below was therefore bound by the contracting officer's findings that the delays were due to unforeseeable causes.[5]

[5] While the court below placed great reliance (R. 17) upon the contracting officer's use of the term "unforeseen," rather than the contractural term "unforeseeable," to describe the

Not only the contracting officer but also the respondent itself acted throughout on the basis that the delays in question were within the purview of the proviso to Article 9—delays due to unforeseeable causes.[6] As noted above, it did not appeal from the contracting officer's findings that the delays were unforeseeable. And long after the expiration of the 30-day appeal period provided by Articles 9 and 15 of the contract (R. 6, 7, 10, 12; *infra;* p. 31) it filed, as the court below found, "a claim with the Civil Aeronautics Administration of the Department of Commerce for damages due to unforeseeable delays" (Fdg. 7; R. 16).[7] From the very outset, respondent complied with the procedure established by Article 9 for keeping the contracting officer notified with respect to delays (Fdg. 4; R. 5, 6, 10, 12). It sought extensions of time and accepted those

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soil conditions which caused the delays, that court itself, in *H. B. Nelson Construction Co.* v. *United States*, 87 Ct. Cls. 375, certiorari denied, 306 U. S. 661, dealt with an "unforeseeable" clause such as that here involved (87 Ct. Cls. at 386) by repeatedly referring to "an unforeseen cause of delay for which the contractor is not responsible under Article 9"; "unforeseen delays excusable under Article 9"; and "an unforeseen cause of delay under Article 9." See 87 Ct. Cls. at 389–390.

[6] Compare the language used by respondent in its Brief in Opposition, p. 2, in which it describes the delays as "inexcusable."

[7] The court below found that this claim was denied "for lack of jurisdiction" (Fdg. 7; R. 16)—presumably because it was untimely.

granted by the contracting officer (Fdg. 4; R. 10–14), thereby being excused from the payment of liquidated damages. Having had the advantage of Article 9, respondent cannot now complain that the delays were not within the contemplation of that Article.

Nor can the judgment below be rested on the only fault attributed to the Government by the court below—the establishment of the 120-day period, which the court below described as "a mistaken calculation" (R. 17). This characterization amounts to nothing more than another way of saying that the conditions leading to the delay were foreseeable, for if fault there was, it lay only in the failure to foresee that the 120-day limitation was too short—a fact that the court below thought foreseeable. Whether cast in one form or the other, the statement, for the reasons outlined above, is erroneous. Moreover, the court made no finding that this was a mistaken calculation (cf. *United States* v. *Esnault-Pelterie*, 299 U. S. 201) and in view of the contrary finding of the contracting officer (Fdg. 4, R. 13), it could not have done so. See cases cited, *supra*, p. 22.

D. *Under Section 3–16 of the specifications in the contract, the contractor assumed the risk of damages attendant upon the delay resulting from the soil conditions.*—If, despite the clear purport of the unappealed findings of the contracting officer, the soil conditions leading to the delay could be

characterized as foreseeable, the judgment of the court below is nevertheless erroneous. Section 3–16 of the specifications provides that (Fdg. 2; R. 9, *infra*, p. 31):

> It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract.

The negligent failure to foresee the soil difficulties, if such it was, was respondent's failure as well as that of the Government, and the specifications above-quoted plainly cast responsibility for such failure on the contractor. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184, 188. It is not unreasonable to expect that a prospective contractor, who is "neither unsophisticated nor careless," would, in the light of such a provision as Section 3–16, protect itself "against such delays as are complained of by the higher price exacted for the work." *Wells Bros. Co.* v. *United States*, 254 U. S. 83, 87.

Reversal of the judgment below cannot be avoided on the theory that the Government's breach may have consisted of its premature issuance of the notice to proceed which started the

running of the 120-day period (Fdg. 2; R. 9). In the first place, the court below did not find that the notice was prematurely given; instead it found that "Immediately upon receipt of the notice to proceed the plaintiff proceeded with the work * * *" (Fdg. 3; R. 10). Moreover, there is no indication and no finding by the court below that respondent, who was familiar with the location of the work, the conditions under which the work was to be performed, and "all other matters which * * * affect the work" (Sec. 3–16 of the specifications, R. 9) raised any question with respect to the timing of the notice to proceed. By not having made timely objection and by having proceeded to work pursuant to the notice to proceed (Fdg. 3; R. 10), respondent must be taken to have acquiesced in its issuance at the time it was issued, and, in the light of Section 3–16 of the specifications, with full knowledge of the difficulties which were likely to be encountered in the performance of its work.[8]

[8] In this connection it is to be noted that when respondent did ask the contracting officer for an extension of time it also sought an "adjustment for additional overhead and expense" (Fdg. 4; R. 10). The contracting officer replied that "consideration would be given to an appropriate extension of time" (Fdg. 4; R. 10) and thereafter granted such extensions (Fdg. 4; R. 10–14). In this decision respondent also acquiesced. It took no appeal, either under Article 9 of its contract (R. 5–6; *infra*, pp. 29–31) or under Article 15 (R. 7). It appealed neither from the implied decision of the contracting officer to grant it no "adjustment for additional over-

CONCLUSION

For the reasons stated, the judgment below is erroneous and should be reversed.

Respectfully submitted.

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head and expense" (Fdg. 4; R. 10) nor from his findings upon which the extensions of time for performance were based. Cf. *United States* v. *Joseph A. Holpuch Co.*, Nos. 696 and 697, October Term, 1945, decided May 20, 1946; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Callahan Walker Co.*, 317 U. S. 56.

APPENDIX

CONTRACT

ARTICLE 1. * * * The work shall be commenced as soon as practicable, and shall be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed.

* * * * *

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon

the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor for proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

* * * * * *

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been

delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting

officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

* * * * *

SPECIFICATIONS

3–16. *Knowledge of Conditions.*—It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract.

* * * * *

3–25. *Cooperation.*—The Contractor shall cooperate with other Contractors and Government agencies doing construction work at the site and

shall employ such methods and means in executing his work so as not to interfere with or cause any interruption to the work being installed by such Government agencies or by any other Contractor or public utilities company. The Contractor shall execute his work in such a manner and serve notices in ample time as to afford the other Contractors and agencies operating on the site to coordinate their work with the work under this contract.

* * * * *

5–2. As the paving of the runways and taxiways is completed, the rough grading of the shoulders will be performed by the Government, and sections so rough graded will be released to this Contractor for work under this contract.

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